

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Declaratory
Ruling Regarding Public, Educational, and
Governmental Programming

MB Docket No. 09-13

CSR-8127

CSR-8128

To: The Media Bureau

EMERGENCY PETITION FOR TEMPORARY STANDSTILL

THE MCALLEN INDEPENDENT SCHOOL DISTRICT

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
BACKGROUND	3
A. McAllen Instructional Television (“MITV 17”).....	3
B. Time Warner’s Proposed PEG Digitization.	8
C. The Relevance of the Time Warner Action To This Proceeding.	10
DISCUSSION	13
I. THE FCC MUST ACT IMMEDIATELY TO PROTECT PEG CHANNELS PENDING A FINAL DECISION IN THIS DOCKET.	13
II. THE COMMISSION AND BUREAU HAVE AMPLE AUTHORITY TO ISSUE A STANDSTILL ORDER, AND ISSUANCE OF SUCH AN ORDER IN THIS CASE IS CONSISTENT WITH COMMISSION PRECEDENT.	14
A. The Bureau Has Authority To Issue a Standstill Order.	14
B. A Temporary Standstill Order Is Appropriate Here.	15
1. The Likelihood of Success on the Merits.	16
2. The Threat of Irreparable Harm Absent the Standstill Order.	22
3. The Degree of Injury to Other Parties if Relief Is Granted.....	24
4. The Public Interest.....	25
CONCLUSION.....	27

SUMMARY

Since February of 2009, the Commission has been considering petitions for declaratory ruling regarding the Cable Act's requirements with respect to the carriage of public, educational, and governmental ("PEG") access channels. Among other things, the petitions asked the Commission to declare that it violated the Cable Act for a cable operator to discriminate against PEG channels as compared to full power broadcast channels, and asked the Commission to declare, consistent with its technical standards regulations, that PEG channels should be delivered in a manner equivalent to the manner in which broadcast channels are delivered to the public. The Commission called for public comment on these petitions, and the public responded in force—filing thousands of comments, most in support of the protection of PEG channels. Had the Commission issued the requested rulings, it would have prevented incumbent cable operators from discriminating against PEG channels or exercising editorial control over the PEG channel capacity. But, some 19 months later, the Commission has not yet issued a decision in this docket. Unfortunately, cable operators and video programmers are now using this delay to their advantage. The operators are moving ahead with their plans to "re-claim" PEG capacity and to use it for their own commercial purposes, regardless of how the Commission ultimately interprets the Cable Act. If the Commission does not act quickly, it risks surrendering its jurisdiction over the important questions raised in this docket.

The latest targets of discrimination against PEG channels are communities in the state of Texas, where Time Warner has announced that it intends to digitize PEG channels as of October 1, 2010. In order to continue to receive PEG channels, members of the public who are not already subscribers to more expensive Time Warner services, or who do not have advanced digital televisions, must request the PEG channels, obtain a converter, and ultimately pay extra to receive this vital service. Rather than being universally available to cable subscribers in the community, *particularly* to vulnerable populations, the PEG channels will disappear from the televisions of members of the public who could obtain the most benefit from them.

The McAllen Independent School District (like other school districts in Texas) is a major user of its educational access channel. Its channel, MITV 17, is used not only to distribute programming within the schools, but to reach students, parents, and at-risk members of the public who may not be able to afford to pay extra to receive PEG channels. The School District has a special interest in maintaining the *status quo*. But it is not alone in this regard. Absent Commission action, operators can be expected to discriminate against PEG channels in many states.

The value of PEG channels has never depended upon them having a viewership similar to that of commercial offerings. Nonetheless, as a practical matter, if the channels cannot even reach a significant portion of the target audience for PEG programming, support for PEG channels will disappear, and this vital programming

will also disappear. Operators understand that if PEG channels can be delivered in a manner that makes it more difficult or expensive to receive the channels, they can recapture capacity for their own commercial purposes, and undercut one of the central public interest benefits provided by the Cable Act. Continued delay may mean an end to PEG altogether, and in any case, it will mean that schoolchildren and the public will lose their current access to important public information. When the Commission finally decides the petitions, the long-standing *status quo* – under which PEG channels were accorded the same treatment as local public broadcast stations—will have changed so dramatically that it may be impossible to restore or repair the harm.

To preserve its jurisdiction over these critical issues, the Commission should issue a temporary standstill order to preserve the *status quo* until a final decision can be released. The Commission should issue a standstill order that requires any cable operator that had been carrying PEG channels in the same manner as local public broadcast stations to continue to do so. That is, the Commission should prohibit new discrimination against PEG channels. The Commission should ensure that the order protects communities in Texas, and, more broadly, it should prevent operators from taking advantage of the Commission's delay.

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EMERGENCY PETITION FOR TEMPORARY STANDSTILL

The McAllen Independent School District (the “MISD”)¹ files this Emergency Petition requesting the Commission issue a standstill order to protect public, educational, and governmental (“PEG”) channels in Texas and elsewhere from damage until such time as the Commission finally resolves the issues in this docket.

In Texas, Time Warner Cable (“Time Warner”) has stated that as of October 1, 2010, it will cease to provide any PEG channels in an analog format, and will solely provide these channels in a digital format. The company will continue, however, to provide other basic service tier programming, including broadcast channels, in an analog format. As a result, on October 1, 2010, a subscriber in these Texas communities

¹ The MISD serves over 25,000 students, 34 campuses, 3,400 employees, and 1,700 teachers in the City of McAllen, Texas and surrounding areas. The MISD’s mission is to educate all students to become lifelong learners and productive citizens in a global society through a program of educational excellence utilizing technology and actively involving parents and the community.

with analog equipment will be able to continue to watch the broadcast channels, but, unless that subscriber takes affirmative, costly steps, the PEG channels will go dark.

If Time Warner is allowed to move forward, the MISD's educational access channel, McAllen Instructional Television, and those who depend on it for access to important information are likely to be irreparably harmed. But this harm can and should be avoided. In this docket, two petitions have been pending for more than 19 months that ask the Commission to clarify fundamental provisions of Title VI of the Communications Act (the "Cable Act") regarding PEG channels. Among other things, the Commission has been asked to declare that cable operators may not discriminate against PEG channels by making them more expensive or difficult to receive. Operators have been on notice that there is a serious issue as to the right of operators to discriminate against PEG channels, and one would have supposed that operators would have maintained the long-standing *status quo*—under which PEG channels are treated the same as full-power broadcast stations—while the matter was pending.. Instead, some operators have chosen to move forward in a way that makes it more difficult and expensive to receive PEG channels, and that threatens the functioning of those channels.

The pending Texas digitization is the latest effort to discriminate against PEG channels, and if Time Warner is permitted to carry through with its October 1 plan, more efforts can be expected. To preserve its own jurisdiction, and to ensure it is able to issue meaningful orders in this proceeding, it is critical that the Commission

immediately issue a temporary standstill order to preserve the *status quo* until a final decision can be released.

BACKGROUND

The McAllen Independent School District does not believe that it is unique, or that the discrimination against PEG channels is limited to Time Warner. But Time Warner's planned October 1 plan presents an immediate threat to PEG channels, and it is an example of the problems that have arisen and will continue to arise absent an appropriate standstill order. Without such an order, there is little prospect that the threats will vanish. Time Warner, for example, has flatly refused to negotiate in any meaningful way;² Charter has already digitized signals in Missouri. The MISD's story explains why the digitization is so harmful, and why immediate action is therefore appropriate to protect the public and the Commission's own jurisdiction.

A. McAllen Instructional Television ("MITV 17").

The McAllen Independent School District's mission is to educate all students to become lifelong learners and productive citizens in a global society. To this end, the District has created a program of educational excellence that utilizes technology and that actively involves the community. Critical to this effort is the District's educational access channel, McAllen Instructional Television ("MITV 17"). For over 15 years, MITV

² Letter from Gardener F. Gillespie to Nicholas P. Miller, dated September 8, 2010, attached hereto as Exhibit A.

17 has provided news and events to *all* cable subscribers in the District community. It is currently located at Channel 17 on the Time Warner system.

To understand why the Channel is so important to MISD and to the community, it is important to understand the school district. The McAllen Independent School District serves approximately 25,101 students. About 23,123 are Hispanic, and for approximately 8.36% of the population, English is a second language. Many students are low-income students – about 66.99% are eligible for free or reduced-price lunches. In addition, the schools district serves a substantial migrant community. The school community is also 27.54% limited English proficient 7.17% special education, and 2.38% migratory (families that travel to work outside the area/state, for extended periods of time with students often falling behind academically).³

MISD has recognized that in order to achieve its educational goals, it is important to be able to communicate with students in the schools, and in the home. MISD has also recognized that it is important to reach out to and communicate with people who are not in the schools. MISD engages parents directly, and also by delivering information to them at the home. It has recognized that it must do everything it can to reach out to people who have dropped out of the educational system, and to keep at-risk students in the educational system. Although MISD uses its website to communicate, it has also recognized that a substantial number of families

³ Declaration of James J. Ponce Ed.D, attached hereto at Exhibit B (“Ponce Declaration”), ¶ 2.

that it seeks to reach may not have a home computer. Thus, communication through television, including MITV, takes on prominent importance.⁴ MISD has recognized it must do everything it can to reach out to people who have dropped out of the educational system, to keep at-risk students in the educational system, and to provide information to groups that face particular challenges, such as families of autistic children.⁵ Finally, there are significant public health and safety issues associated with schools. For example, the recent flu epidemics presented extraordinarily difficult challenges to public schools. In order to be able to continue to operate effectively and safely, schools needed to communicate to the public clearly about the risks of disease, and how to avoid it, and had to do so very quickly.⁶

In many instances, and for many groups, MITV 17 is the critical communications tool.⁷ Indeed, crisis situations such as hurricanes and tropical storms require MISD to utilize the MITV 17 to make parents aware of the process used to determine if a school should close, and the ramifications of such a decision.⁸

⁴ Ponce Declaration ¶ 4.

⁵ *Id.*

⁶ *Id.* at ¶ 5.

⁷ MISD's experience in this regard is consistent with publicly available information regarding reliance on television. A recent report by Dr. Martha Fuentes-Bautista noted that "online environments might not be the primary space where audiences can find local content. A comparative assessment of news media outlets found that the Web is not a primary provider of local information." **Beyond Television: The Digital Transition of Public Access, (April, 2010).**

⁸ Ponce Declaration at ¶ 5.

Examples of regular MISD programming include a news-magazine show on school news and events, talk shows on important topics like student health, immunizations, food services, transportation and school procedures, topical shows on science and even how to make quick, healthy snacks at home. A College and Career Readiness program provides parents with specific information on the college application process and financial assistance available. “Learn Not To Burn” is a special program specifically produced for the hearing impaired population. It provides students from the Regional School for the Deaf with specific information on way they can avoid injury or death in a crisis situation. MISD also has programs on conversational Spanish and algebra. Student-produced programming airs as well. MISD also airs school board meetings for interested members of the community who are unable to attend. Among other programming:

- ***Honor Roll.*** The signature show for MITV and multiple award winner, the *Honor Roll* is a 30-minute news magazine show covering all the big news and events in the school district. A different campus serves as host for each episode.
- ***Math is Infinite / Platiquemos (Let’s Talk).*** Since MISD’s fundamental mission is instruction, MITV has launched two innovative programs on math and Spanish. *Math is Infinite* features high school algebra teachers explaining some tricky concepts in simple, easy-to-follow steps. *Platiquemos (Let’s Talk)* features students on far-out adventures while learning conversational Spanish.
- ***FYI.*** What are the steps in the college application process? What immunizations does your child need? What is available in terms of after-school programs? Those are just some of the topics covered on *FYI (For Your Information)*. It’s a talk show that brings you up to date on the educational front.

- ***KMAC Student Productions.*** They are the news directors and TV producers of tomorrow. Students from McAllen High, Memorial and Rowe participate in the district's media-technology courses and get hands-on experience in operating video cameras, video editing, script writing and TV production. Known by the call letters KMAC, KMACers have won countless awards over the years and their "Wall of Fame" testifies to the number of graduates they've sent into the world of professional media.⁹

Members of the community have learned of public health matters, including immunizations and flu shots, from programming on MITV 17. MISD has received a variety of positive feedback from the community about this programming, especially about the health information during H1N1 breakout in late Spring 2009.¹⁰

Last year, MISD cablecast approximately 8760 hours of programming and substantial portions of that programming was in Spanish.¹¹

MITV 17 is currently available throughout the community without additional burdens vis-à-vis broadcast channels or other channels on the basic service tier.¹² But Time Warner proposes to change all that by providing the channel only in a digital format, and by requiring many consumers to take special steps to receive the programming. MISD's experience in dealing with parents and students indicates that the effect of digitization, described below, will be to prevent the school district from

⁹ Ponce Declaration at ¶ 8.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 7.

¹² *Id.* at ¶ 9.

communicating with many particularly vulnerable and at-risk groups, among other serious harms.¹³ That puts public health and safety at risk.

B. Time Warner's Proposed PEG Digitization.

On or around June 29, 2010, Time Warner notified various Texas municipalities that as of August 5, 2010, the company would cease to provide PEG channels in an analog format and would solely provide the channels in a digital format (the "PEG Digitization"). Subsequently, on or around July 19, 2010, Time Warner announced that it would delay the PEG Digitization until October 1, 2010.¹⁴

Time Warner does not plan to go "all-digital" across its system. Instead, the company will continue to transmit many other channels, including broadcast channels on the basic service tier, in an analog format. As a result, on October 1, the PEG channels will not be available to subscribers who do not have a converter, or who do not own a digital television set.¹⁵

Time Warner will not automatically provide its subscribers with the devices necessary to receive the PEG channels. Instead, it will require customers to request the

¹³ *Id.* at ¶ 8.

¹⁴ The MISD had hoped to use that time to work with other affected entities attempt to negotiate either a process that would tie PEG digitization to digitization of other programming, or some other solution that would reduce the impact on the schools and the general public. Unfortunately, as noted above, Time Warner has now made it clear that absent a court or FCC directive, it has no intention of either negotiating or delaying digitization, making this Emergency Petition necessary.

¹⁵ Time Warner is mapping its system so that the PEG channels, although digitized, will be mapped to the same channel number.

converters, and to pay an installation fee if any assistance is required to install the converters. With limited exceptions, affected subscribers will also have to pay an additional monthly fee to receive the PEG channels. In short, Time Warner has set up a special hurdle for PEG channels: customers must *know* that they require special equipment to receive the channels; must *request* that equipment separately from the request for basic service; and must *pay extra fees* to receive the service.¹⁶

The hurdle is even higher for schools and for certain subscribers in nursing homes and other facilities that receive service in bulk. The MISD schools, for example, typically have analog television sets, and in order to continue to view PEG channels, would require a converter for every television set, or some arrangement that would allow each television in the school to select and view the PEG channels. While Time Warner has promised it would provide converters or some other solution, it has not yet done so, and there is no indication it will be able to do so in a timely way.

¹⁶ Time Warner proposed to offer customers that subscribe only to the basic service tier a single converter, free of any monthly charge through December 31, 2015, provided that the subscriber affirmatively requests such a converter. To obtain converters for any additional television sets, the BST-only subscribers must pay Time Warner's monthly rental fees. Of course, very few subscribers are basic-only subscribers. Time Warner also proposed to offer Standard service subscribers a converter without charging rent "for the first year," provided that the subscriber affirmatively requests a converter within a specified period of time. However, that time has nearly passed; and the offer has not been heavily publicized. In any case, these subscribers also would have to pay Time Warner's monthly rental fees to obtain converters for any additional television sets. The offer will not apply to new customers.

Time Warner has been quite blunt as to why it is discriminating against the PEG channels: it wishes to advance its own commercial offerings, at the expense of the PEG channels.¹⁷

C. The Relevance of the Time Warner Action To This Proceeding.

This docket was commenced 19 months ago, shortly after the Commission received three petitions, each of which required it to decide fundamental issues regarding the federal requirements applicable to PEG channels. Two of the petitions – one filed by the Alliance for Community Media *et al.*, and another filed by the City of Lansing -- asked the Commission to declare that AT&T's provision of PEG channels violated the Cable Act. The third petition was filed pursuant to a court order, requesting that the Commission decide, *inter alia*, whether Comcast could lawfully do what Time Warner proposes to do here – discriminate against PEG channels by digitizing the PEG channels while providing other basic tier channels in an analog format.

On February 6, 2009, the Media Bureau released a Public Notice consolidating the three petitions and seeking public comments on the three petitions for declaratory ruling.¹⁸ What the Commission recognized in consolidating the petitions was that all

¹⁷ See, e.g., Letter from Thomas Aguillon to Mike Perez, dated June 28, 2010, attached hereto as Exhibit C.

¹⁸ Entities File Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming, DA 09-203 (Feb. 6, 2009). The three petitions are: *Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in City of Dearborn et al. v.*

three petitions involved overlapping issues regarding the Cable Act requirements for “the carriage of public, educational and governmental (“PEG”) channels.” Over 6,000 comments were filed in response. On March 16, 2010, the Dearborn Petition was dismissed, after Comcast agreed that it would not proceed with its plan to deliver PEG channels only in a digital format while transmitting other channels on the basic service tier in an analog format.

Although the remaining pending petitions concern AT&T, the petitions necessarily require the Commission to interpret provisions of the Cable Act that apply more broadly, and that would directly affect the validity of the proposed Time Warner PEG Digitization. The Alliance Petition shows that in 1984 and 1992 amendments to the Cable Act, Congress barred discrimination against PEG channels.¹⁹ Among other things, the petition notes that Congress enacted Section 623(b)(7)(A)’s basic service tier requirement to clarify that cable operators may not discriminate against PEG channels:

PEG programming is delivered on channels set aside for community use in many cable systems, and these channels *are available to all community members on a nondiscriminatory basis*, usually without charge PEG channels serve a substantial and compelling government interest in diversity, a free market of [ideas,] and an informed and well-educated citizenry.²⁰

Comcast of Michigan III, Inc. et al., of the City of Dearborn, Michigan et al., MB Docket No. 09-13 (Dec. 9, 2008) (the “Dearborn Petition”); *Petition for Declaratory Ruling of the City of Lansing, Michigan*, MB Docket No. 09-13 (Jan. 27, 2009) (the “Lansing Petition”); *Petition for Declaratory Ruling of Alliance for Community Media et al.*, MB Docket No. 09-13 (Jan. 30, 2009) (the “ACM Petition”).

¹⁹ Petition at 23-30.

²⁰ ACM Petition at 25; H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 85 (1992).

The petition further shows that the Commission has barred the discrimination against PEG channels through its own signal quality rules.²¹ The petition also calls upon the Commission to apply Section 611(e), which prohibits a cable operator's "exercise [of] any editorial control over any [PEG] use of channel capacity."²² Similarly, the City of Lansing argues that Congress required a cable operator to place PEG channels on the basic service tier, and that this requirement must be interpreted from the perspective of subscribers.²³ A channel is not on basic service if one must jump additional hurdles to receive that channel, as compared to other basic service programming. A ruling in favor of petitioners on any of these points will necessarily mean that the proposed Time Warner Digitization, or similar actions by other operators, would be unlawful.

To be sure, there are independent claims that could be filed against Time Warner in the courts in Texas. Further, the pending FCC petitions could be decided on narrower grounds. Nonetheless, the issues described above are pending before the Commission, and one of the points of this proceeding was to avoid operator-by-operator battles over PEG – battles that PEG providers simply cannot afford to fight community-by-community. It is therefore appropriate in this proceeding for the

²¹ ACM Petition at 26-27.

²² ACM Petition at 30; 47 U.S.C. § 531(e).

²³ Lansing Petition at 9-13.

Commission to issue a standstill order that protects all PEG providers, throughout the nation, from changes in the *status quo* that existed at the time the petitions in this matter were originally filed. And emergency order is required to prevent an imminent harm.

DISCUSSION

I. THE FCC MUST ACT IMMEDIATELY TO PROTECT PEG CHANNELS PENDING A FINAL DECISION IN THIS DOCKET.

As noted above, in this docket, the FCC is currently considering issues under the Cable Act that weigh directly on the lawfulness of Time Warner's proposed PEG Digitization in Texas. While an immediate decision on the merits would be preferable, to protect its own jurisdiction, the FCC must at least prevent operators like Time Warner from harming PEG while this docket is pending.

PEG channels have traditionally been provided on the same tier, and in the same manner as local full-power broadcast stations; the channels did not have to be specially requested; equipment to receive the channels did not have to be specially requested; and subscribers did not have to pay an equipment or service surcharge, or take special steps to receive and view PEG channels. Petitioners have argued, effectively, that this traditional treatment reflects the requirements of the law. But in any case, this traditional treatment reflected the *status quo* at the time the petitions were filed.

Operators have been moving to alter this *status quo*. Charter digitized channels in Missouri this summer.²⁴ Time Warner's proposed treatment of MITV 17 and other PEG channels in Texas shows that there is a continuing, real and immediate threat to the provision of these channels. The incentives for operators to harm PEG are real and significant, as the statements by Charter and by Time Warner show (comments filed in the Comcast-NBC/Universal merger proceeding also make this point). Accordingly, until the Commission can release a final decision in this docket, the Commission should issue a temporary standstill order that preserves the *status quo* by barring any cable operator from continuing any action that would make PEG channels less accessible to subscribers than other programming provided on the basic service tier.

II. THE COMMISSION AND BUREAU HAVE AMPLE AUTHORITY TO ISSUE A STANDSTILL ORDER, AND ISSUANCE OF SUCH AN ORDER IN THIS CASE IS CONSISTENT WITH COMMISSION PRECEDENT.

A. The Bureau Has Authority To Issue a Standstill Order.

The Commission's authority to issue a standstill order pending its resolution of a legal issue is well-established. *United States v. Sw. Cable Co.*, 392 U.S. 157, 181 (1968). Under Section 4(i) of the Communications Act, the Commission has the authority to issue "such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). In addition, the Bureau has authority to issue such

²⁴ A story appearing at <http://www.semissourian.com/story/1620218.html> discusses the Missouri change, and also illustrates another reason why issuance of an order in this docket that would protect the *status quo* everywhere is important: namely, many communities are not aware that there is even a pending issue as to the legality of the planned changes to PEG channels.

an order under Sections 0.61 and 0.283 of the Commission's rules.²⁵ Accordingly, the Commission and its bureaus have repeatedly recognized the authority to issue standstill orders.²⁶

B. A Temporary Standstill Order Is Appropriate Here.

Based on the circumstances described above, a temporary standstill order is appropriate. The standstill order would not be highly disruptive or far-reaching. It would simply ensure that PEG channels are provided in accordance with the traditional *status quo* pending a Commission decision, by barring any cable operator from continuing any action that would make PEG access channels less accessible to any subscriber.

The Commission has declined to delineate procedural requirements or a single evidentiary standard that is applicable to requests for interim injunctive relief or other emergency orders.²⁷ However, the Commission and the federal courts generally consider four criteria to evaluate requests for injunctive relief:

- (1) the likelihood of success on the merits;
- (2) the threat of irreparable harm absent the grant of preliminary relief;
- (3) the degree of injury to other parties if relief is granted; and

²⁵ See 47 C.F.R. §§ 0.61, 0.283; *In re Sky Angel U.S., LLC*, 25 FCC Rcd. 3879, 3881 ¶ 6 n.31 (2010).

²⁶ *In re AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 14508 (1998); *In re Time Warner Cable*, 21 FCC Rcd. 9016 (2006); *In re Sky Angel U.S., LLC*, 25 FCC Rcd. 3879 at ¶ 6 n.31 (2010).

²⁷ *In re AT&T Corp. v. Ameritech Corp.*, FCC 98-141, 13 FCC Rcd. 14508 at ¶ 13 (1998) citing *Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, 12 FCC Rcd. 22497 at ¶ 169 (1997).

(4) whether issuance of the order will further the public interest.²⁸

In this case, balancing these four factors shows that a temporary standstill order is appropriate.

1. The Likelihood of Success on the Merits.

When it rules on the pending petitions, the Commission is very likely to conclude that the Cable Act bars editorial control of the PEG channels, and that this bar extends to actions that materially affect the availability of those channels. It is also likely to find that a hallmark of prohibited editorial control is the discriminatory treatment of PEG access channels as compared to local full-power broadcast stations. Indeed, it is likely to find that discriminatory treatment is inconsistent with the basic concept of a PEG channel. The Commission's ruling is likely to highlight a number of fundamental principles regarding PEG channels in the Cable Act:

- *The Bar Against the Exercise of Editorial Control Over PEG Access Channels.*

In ruling on the petitions, the Commission may rely on Section 611(e) of the Communications Act, which contains a clear and non-waivable requirement that a cable operator "shall not exercise any editorial control over any public, educational, or governmental *use of channel capacity* provided pursuant to [the Cable Act]"²⁹ This prohibition was central to the PEG scheme. "The Committee believes that it is integral

²⁸ *In re AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd. 14508 at ¶ 13 (Jun. 30, 1998); *In re Time Warner Cable*, MB Docket No. 06-151, 21 FCC Rcd. 9016 at ¶ 8 (Aug. 7, 2006).

²⁹ 47 U.S.C. § 531(e) (emphasis added).

to the concept of the use of PEG channels that such use be free from *any editorial control or supervision* by the cable operator.”³⁰ “With regard to the access requirement, cable operators act as [] conduits.”³¹ This channel capacity is “controlled by a person other than the cable operator.”³²

By its terms, this provision is not limited to “content” control, but is broader, encompassing any of the activities that constitute “editorial control.” Under the PBS editorial control test, for example, “[t]he ability to withhold or control distribution will be treated in the same manner as the ability to control content.”³³ The location of content is often treated as an aspect of “editorial control.”³⁴ Hence, within the common meaning of the term, the Cable Act protects against both *direct* content control by operators, and also actions that materially affect the availability and accessibility of the channels. Section 611(e) is thus properly understood as a key element of a legislative scheme that the legislative history expressly states was designed to prevent operators from discriminating against PEG channels and in favor of their own commercial offerings.

³⁰ House Report at 47, 1984 U.S.C.C.A.N. at 4684 (emphasis added).

³¹ *Id.* at 35; 1984 U.S.C.C.A.N. at 4672.

³² *Id.* at 31; 1984 U.S.C.C.A.N. at 4668.

³³ http://www.pbs.org/producers/guidelines/principles_ia.html. The ability to control program scheduling is also treated as an exercise of editorial control.

³⁴ <http://drupal.org/node/905766>

Hence, the Commission is likely to find that treating PEG channels in a way that makes those channels less accessible and less available to the community constitutes an improper exercise of “editorial control” over PEG channel capacity.

- *The Duty To Convey PEG Channels to the Cable Subscribing Community Without Discrimination or Operator Control.*

A Commission decision on the pending petitions is also likely to recognize that PEG channels must be provided in accordance with a “framework” established by the Cable Act.³⁵ The petitions call on the Commission to clarify this “framework.” While the statutory phrase—“public, educational, or governmental use”—appears repeatedly in the Cable Act,³⁶ the phrase itself is not defined.³⁷ But “Congress’s meaning and intent is apparent from the legislative history of the Cable Act.”³⁸ The Cable Act

³⁵ *Time Warner Cable of New York City v. City of New York*, 943 F. Supp. 1357, 1367 (S.D.N.Y. 1996), *aff’d on other grounds*, 118 F.3d 917 (2d Cir. 1997) (a franchise agreement “gives life to Section 531(a), [but] Section 531(a) also establishes a framework for these franchise agreements: that the channels be set aside for public, educational, and governmental use.”).

³⁶ *See, e.g.*, 47 U.S.C. § 522(1) (defining “activated channels” as those “designated for public, educational, or governmental use”); 47 U.S.C. § 522(16) (defining “public, educational, or governmental access facilities” as “channel capacity designated for public, educational, or governmental use” and associated facilities and equipment).

³⁷ *Goldberg v. Cablevision Systems Corp.*, 261 F.3d 318, 321 (2d Cir. 2001).

³⁸ *City of New York*, 943 F. Supp. at 1367; *see also Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 727, 790 (1996) (Kennedy, J., concurring) (“Congress has not, in the 1984 Act or since, defined what public, educational, or governmental access means or placed substantive limits on the types of programming on those channels. Those tasks are left to franchise agreements, *so long as the channels comport in some sense with the industry practice to which Congress referred in the statute.*”) (emphasis added).

establishes certain overriding duties regarding PEG channels with which an operator must comply.³⁹

Chief among these duties, PEG channels must be distributed without operator's control or discrimination to each end user, at least absent an express agreement to the contrary. Thus, even before Congress adopted the Cable Act, PEG access requirements were understood to divest the operator of control, and to create a duty to deliver programming produced by others *to all subscribers*. As the Supreme Court put it, with respect to PEG, cable systems are relegated "*pro tanto*, to common carrier status."⁴⁰ The legislative history made it clear that Congress intended for PEG channels to be available to all without additional charges, expense or burden: "[C]able access regulations are 'content neutral, yet substantially increase() the number of voices that can reach the home.'"⁴¹ "With regard to the access requirement, cable operators act as conduits."⁴² The legislative history repeatedly stresses the ability to use PEG channels to communicate with the larger community:

A requirement of reasonable third-party access to cable systems will mean a wide diversity of information sources *for the public* -- the fundamental goal of the First Amendment -- without the need to regulate the content of program provided over cable Public access channels are often the video equivalent of the speaker's soap

³⁹ These duties can only be understood "in light of Congress's general purposes in authorizing PEG channels." *City of New York*, 118 F.3d at 927.

⁴⁰ *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700-701 (1979).

⁴¹ H. Rep. No. 98-934 at 33-34 (1984), 1984 U.S.C.C.A.N. 4655, 4670-71 (emphasis added).

⁴² *Id.* at 35, 1984 U.S.C.C.A.N. at 4672.

box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become *sources of information in the electronic marketplace of ideas*. PEG channels also *contribute to an informed citizenry* by bringing local schools into the home, and by *showing the public* local government at work.

In 1992, Congress underscored an operator's obligation by adopting two other requirements.

First, Section 621(b)(3) of the Communications Act generally prohibits franchising authorities from requiring a cable operator to provide any telecommunications services, which are by definition common carrier services, 47 U.S.C. § 153(46)).⁴³ The provision makes a specific exception for PEG channels, however, precisely because once PEG channels are designated for public use, an operator effectively must treat that channel capacity in much the same way as a common carrier is obligated to treat messages delivered to it – namely, the common carrier is obligated to deliver the message in a non-discriminatory manner, and (as importantly) cannot favor its own messages.

Second, Congress decided that the public would be best served by an explicit provision ensuring that there was a tier offered to every subscriber that included the PEG channels and broadcast signals. Consequently, Congress required that “each cable operator of a cable system shall provide its subscribers a separately available basic

⁴³ 47 U.S.C. § 541(b)(3).

service tier to which subscription is required for access to any other tier of service.”⁴⁴

Such basic service tier shall, at a minimum, consist of the following:

- (i) All signals carried in fulfillment of the requirements of sections 614 and 615.
- (ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers. [and]
- (iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.⁴⁵

Consistent with this obligation, the channels must be available to all cable subscribers on the basic service tier:

PEG programming is delivered on channels set aside for community use in many cable systems, and *these channels are available to all community members* on a nondiscriminatory basis, usually without charge PEG channels serve a substantial and compelling government interest in diversity, a free market of [ideas,] and an informed and well-educated citizenry Because of the interests served by PEG channels, the Committee believes that *it is appropriate that such channels be available to all cable subscribers on the basic service tier and at the lowest reasonable rate.*

H.R. Rep. No. 102-628 at 85 (1992) (emphasis added).⁴⁶

In sum, when the Commission rules on the pending petitions, the Commission is likely to clarify that the designation of PEG channels is defined by federal law, which

⁴⁴ 47 U.S.C. § 543(b)(7)(A).

⁴⁵ 47 U.S.C. § 543(b)(7)(A)(i).

⁴⁶ Even members of the Committee who objected to the bill as reported agreed that it was essential that PEG access channels be available to all subscribers: “Making over-the-air broadcast and PEG access channels available on a separate [basic service] tier promotes the time-honored principle of localism.” *Id.* at 183.

imposes a fundamental duty to transmit on the operator, and necessarily prohibits discrimination against PEG channels.

- ***The Duty To Provide Uniform Signal Quality.***

As the Alliance pointed out in its Petition, the Commission has a statutory obligation to “establish minimum technical standards” relating to cable systems’ “technical operation and signal quality.” 47 U.S.C. § 544(e). The Commission is required to update those standards “periodically.” *Id.* As the Alliance also pointed out, it would be entirely consistent with the Commission’s rules for analog standards to prevent discrimination in the transmission of PEG channels.⁴⁷ The Commission has never indicated that it is acceptable to discriminate in the transmission of a particular class of channels generally, or PEG channels in particular. Because the Commission has a duty to update its standards; and because prohibition of discrimination against PEG channels is consistent with the purposes of the Act, as well as existing technical standards; the Commission is likely to find for petitioners on their anti-discrimination claims on this ground as well.

2. The Threat of Irreparable Harm Absent the Standstill Order.

If the Commission does not rule on the petitions or issue a standstill order before October 1, 2010, the threat of irreparable harm to the School District, and to viewers and

⁴⁷ ACM Petition at 25-27.

other providers of PEG programming is substantial. By way of example, the School District will be irreparably harmed in a number of ways:

First, the audience for its programming will be immediately and significantly reduced; future restoration of the channel will not fix the loss of viewership in the interim, and if relief is long enough delayed, the support for PEG channels may be lost altogether.

Second, the ability of MISD to communicate effectively with parents, children, and at-risk populations on an ongoing basis is critical to the ability to deliver effective, educational services. The 19 months the petition has been pending equates to approximately two school years. Allowing PEG channels to be disadvantaged for that period, or any significant period, creates a communications gap that will not be fixed by later action. When the channels become viewable again, MISD will be communicating with a new group of parents, students, and at-risk population.

Third, the ability to continue to disseminate public safety messages to all subscribers, students, teachers, parents, and the general public are placed at risk. The recent flu epidemic illustrates that the loss of the ability to communicate even for a short period can have significant consequences.

Fourth, unless Time Warner provides the schools with converters for every television prior to conversion, MISD will lose the ability to view MITV within our own

classrooms. While Time Warner has promised to provide converters, we have not yet received them.

Fifth, the effectiveness of MITV as a curriculum tool is in part due to the fact that the channel is universally available, and that programming the students produce can be seen throughout the community. Interest in the curriculum program will drop if the circulation of the channel is limited.⁴⁸

These harms are not unique to MISD, or even to school districts in Texas. Absent a standstill order, others, including schools districts, students, and at-risk populations nationwide, will be harmed.

3. The Degree of Injury to Other Parties if Relief Is Granted.

The temporary standstill order would not cause significant harm to anyone. Like most cable operators, Time Warner currently provides the PEG access channels in most of the country so that they are viewable by all subscribers in the community. The temporary maintenance of the *status quo* would merely continue that practice.⁴⁹ There

⁴⁸ See, generally, Ponce Declaration.

⁴⁹ For MISD, it will be sufficient that the Commission's stay affect changes occurring after the filing of this petition. However, to more broadly protect PEG channels, it would be appropriate to reach changes in the treatment of PEG channels that have occurred since the petitions were filed, as all of those changes were made with full understanding that the changes might be declared unlawful by the decision in this proceeding.

A *status quo* order would not affect AT&T, because it has always provided PEG via a Channel 99 platform. While that platform may well be found to be unlawful, in the case of AT&T, there is no "status quo" to either restore or to maintain.

is no apparent technical barrier to maintaining the status quo.⁵⁰ And in any case, the Commission is always free to adjust the stay in particular cases where justified.

4. The Public Interest

The Commission has stressed that the last of the four factors—the public interest—is “crucial,”⁵¹ and that a “compelling demonstration that the public interest would be harmed lessens the level of certainty required of a moving party to show that it will prevail on the merits.”⁵² The public interest would clearly be served by a temporary standstill order and a ruling on the petitions.

Maintaining the *status quo* will serve the public in communities served by Time Warner in Texas and elsewhere. Subscribers in such areas will continue to have access to vital public information, including information on MITV. In addition, such subscribers will not be unjustly charged for equipment, and will avoid the burden to obtain and configure a box for each television simply to watch PEG channels, but not other channels.

Moreover, the public also has a strong interest in Commission resolution of disputes brought before it. In this proceeding, petitioners have filed requests for declaratory ruling asking the Commission to clarify important issues under the Cable Act. After the Bureau called for public comment, over 6,000 public comments have

⁵⁰ *Id.*

⁵¹ *In re Time Warner Cable*, 21 FCC Rcd. 9016 at ¶ 9.

⁵² *In re Sky Angel U.S., LLC*, 25 FCC Rcd. 3879 at ¶ 6.

been filed, many of which call on the Commission to take action to protect PEG channels. That is evidence of the importance of at least preventing operators from harming PEG while the petition is pending.

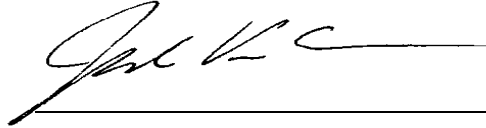
Finally, the Commission has consistently granted standstill orders in order to ensure that it is in a position to preserve its practical jurisdiction to decide issues. If support for PEG channels is diminished by operator action while the petitions are pending, the final decision of the Commission may be of little moment – PEG studios may be shuttered. Moreover, preventing discrimination later will be ineffective for those who are being discriminated against now. The public interest favors maintaining the *status quo* while this petition is pending.⁵³

⁵³ We stress that the standstill order would not dictate how the Commission must rule on the merits of the pending petitions: it would simply ensure that the Commission *has the opportunity* to rule before Time Warner and others move ahead with PEG Digitization plans, and that harms to PEG channels are minimized while the petitions are pending.

CONCLUSION

For the reasons indicated above, the Bureau should rule on the pending petitions before October 1, 2010, or issue a standstill order as described herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nick Miller", written over a horizontal line.

Nicholas P. Miller

Joseph Van Eaton

Matthew K. Schettenhelm

Miller & Van Eaton, P.L.L.C.

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Via E-mail and First Class Mail


September 8, 2010

Nicholas P. Miller, Esq.
Miller & Van Eaton, PLLC
1155 Connecticut Avenue, N.W.
Suite 1000
Washington, DC 20036-4320

Dear Nick:

Thank you for your letter dated September 3, 2010, in which you respond to my letter dated September 2, 2010, and request Time Warner Cable ("TWC") to delay its long-planned migration of Public, Educational and Governmental ("PEG") channels to digital channels on its basic service tier in the communities that you represent. As I indicated in my earlier letter, TWC is committed to moving forward on October 1, 2010, as planned. TWC's timeframe for its PEG transition in your clients' communities has been known for many months, and there seems no need for additional delay based on the reasons that you identify in your letter. Accordingly, while we hope that your clients will decide not to pursue litigation, we reiterate our request that they initiate any lawsuits and file any related papers at least two weeks prior to October 1, 2010, to ensure that any litigation can be resolved in a timely and orderly fashion.

Sincerely,


Gardner F. Gillespie

Partner
gardner.gillespie@hoganlovells.com
D +1 202 637 8796

GFG/gs

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition for Declaratory Ruling
Regarding Public, Educational, and Governmental
Programming

MB Docket No. 09-13

CSR-8127

CSR-8128

DECLARATION

I, James J. Ponce Ed.D., hereby declare under penalty of perjury that:

1. I am Superintendent for the McAllen Independent School District, which is located at 2000 North 23rd Street, McAllen, Texas. My telephone number is 956-618-6027. I oversee the entire operations of the school district, including instruction, business, and operations.

2. The McAllen Independent School District serves approximately 25,101 students. About 23,123 are Hispanic and, for approximately 8.36% of the population, English is a second language. Many students are low-income students. About 66.99% are eligible for free or reduced-price lunches. In addition, the school district serves a substantial migrant community. Our school community is also 27.54% limited English proficient, 7.17% special education, and 2.38% migratory (families that travel to work outside the area/state for extended periods of time with students often falling behind academically).

3. I have separately reviewed and verified the factual statements in the Emergency Petition for Temporary Standstill, and I will not repeat those statements in this declaration. This declaration will provide additional information about McAllen Instructional Television Channel 17 (MITV 17), the McAllen Independent School District's educational access channel, and some of the work we have performed and information we have received since the announcement that Time Warner would shift the channel to digital only (so that it cannot be received by a common, cable-ready analog television).

4. In order to effectively educate, we have recognized that it is important to be able to communicate with students in the schools, and in the home. We have also recognized that it is important to reach out to and communicate with people who are not in the schools. We engage parents both directly but also by delivering information to them at the home. Although our district uses its website as a communication tool, a substantial number of families in our deep South Texas community are economically disadvantaged and may not own a home computer. Therefore, communications through television take on prominent importance. We have also recognized that we must do everything we can to reach out to people who have dropped out of the educational system, to keep at-risk students in the educational system, and to provide information to groups that face particular challenges, such as families of autistic children.

5. There are significant public health and safety issues associated with schools. For example, the recent flu epidemics presented extraordinarily difficult challenges to public schools. In order to be able to continue to operate effectively and safely, schools needed to communicate to the public clearly about the risks of disease and

how to avoid them, and they had to do so very quickly. In addition, crisis situations such as hurricanes and tropical storms require that we utilize MITV 17 to make parents aware of the process we use to determine if a school should close, and the ramifications of such a decision. This includes building emergencies like fires, power outages, HVAC concerns, neighborhood concerns that necessitate lock downs (in place when a criminal suspect is in the area), and other crisis situations that occur.

6. Our school district has adopted a variety of communications tools to these ends. None is a substitute for the others. We communicate directly in the schools; via the Internet; via written materials; and very importantly to us, via television. The most practical way to communicate with many low-income parents or drop-outs, or to convey information about public health issues *is* often electronically via television. To that end, we heavily program MITV 17.

7. We use MITV 17 in several ways. We use it to deliver educational materials to students within the schools to televisions within the classroom. We use it as a curriculum tool, both to teach students communications and technical skills that will help them succeed, but also to engage them in the community by letting them produce and disseminate programming to the public. We use it to deliver educational and informational materials to the home to communicate with students, with parents, and to provide educational and informational material to the public at large. MITV 17 is programmed an average of twenty-four hours a day, seven days a week. Last year, we cablecast approximately 8760 hours of programming and substantial portions of that programming was in Spanish.

8. Examples of our programming include a news-magazine show on school news and events, talk shows on important topics like student health, immunizations, food services, transportation and school procedures, topical shows on science, and even how to make quick, healthy snacks at home. A College and Career Readiness Program provides parents with specific information on the college application process and financial assistance available. It alerts them about special dates for testing and avenues to help their children become better learners. “Learn not to Burn” is a special program specifically produced for the hearing impaired population. It provides students from the Regional School for the Deaf (program administered by McAllen ISD that educates students from throughout the region) specific information on ways they can avoid injury or death in a crisis situation. We also produce instructional programs on conversational Spanish and algebra. Two years ago, we produced an instructional math program called Math is Infinite. This show featured a high school algebra teacher explaining some tricky concepts in simple, easy-to-follow steps. The show was designed for middle school and high school students who may be intimidated by algebra. Other television shows have informed the public on voting eligibility and the location of voting stations during local elections. Student-produced programming airs as well. Entire school board meetings are aired so that the community is aware of instructional, operational, and business matters impacting the school district before and as they occur. Members of the community have learned of public health matters, including immunizations and flu shots, from programming on MITV 17. We have received a variety of positive feedback from the community about this programming. Our school district nursing administrator has heard positive comments about the health information provided on the channel. They were

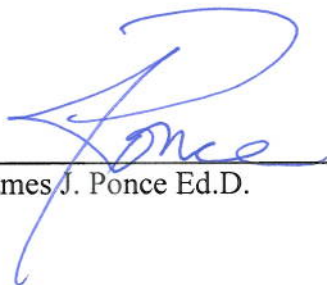
especially appreciative when the H1N1 was going full force in late Spring 2009 with the high impact it had on the McAllen community and students. The clinic information which aired on channel 17 received very positive feedback from the parents.

9. MITV 17 has been operating in its present format since 1995. During the time, it was and currently still is available to every subscriber on the Time Warner cable system. It is provided automatically to all subscribers, and is viewable by all subscribers without any additional equipment or fees. After digitalization, the channel would no longer be available to many customers, unless they are willing to make special equipment requests or pay additional charges.

10. Our experience in dealing with the students and parents has shown us that requirements that may seem very small to some people will, in fact, prevent communications with others. For example, we understand Time Warner has offered to provide free converters to persons who request them by a certain date, and has offered to mail the converter to the subscriber, to make it available for pickup, or to charge for installation. But a low-income person, for example, may be living in a rental unit where delivery by mail is not safe, and may not be easily able to pick up the converter or afford to pay for installation of the box. Also, the high mobility of our population would significantly complicate this arrangement. Additional monthly fees may make service unaffordable. In addition, absent an aggressive marketing campaign by Time Warner, it is highly likely that a substantial number of customers will not understand that a box is required to receive their educational channel.

11. Based on our experience, the digitalization is likely to harm the McAllen Independent School District immediately and irreparably in at least three ways.

- First, we fear MITV 17 will no longer be viewable by a substantial number of subscribers. This immediately will prevent us from communicating effectively with affected students and parents and the public.
- Second, unless Time Warner provides the schools with converters for every television prior to conversion, we will lose the ability to view MITV 17 within our own classrooms. While Time Warner has promised to provide converters, we have not yet received them.
- Third, the effectiveness of MITV 17 as a curriculum tool is in part due to the fact that the channel is universally available, and that programming the students produce can be seen throughout the community. If this is no longer the case, our curriculum will suffer.



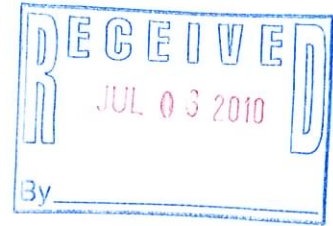
James J. Ponce Ed.D.

9-17-2010
Date

Time Warner Cable
Department of Government Relations
750 Canyon Dr., Ste 500 E
Coppell, TX 75019
Ph: 469-464-4772 \ Fx: 469-464-4021



Fredy Man



June 28, 2010

Mr. Mike Perez
City Manager
City of McAllen
1300 Houston Ave.
McAllen, TX 78501

Dear Mr. Perez:

Effective August, 10 2010, Time Warner Cable (TWC) will take another important step in adding additional programming and improving Internet speeds by reclaiming bandwidth through moving existing programming from analog to digital channels. In order to continue offering customers the advanced services they expect, we must continue our efforts to manage bandwidth utilization more efficiently. Since analog channels require up to 15 times more bandwidth than channels in the digital format, we began the process several years ago of converting analog channels to digital.

As part of this ongoing initiative, on August, 10 2010, Time Warner Cable will convert additional analog channels to digital format, including Public, Education, and Government (PEG) Access channels, which will now be carried on the digital portion of the Basic Service Tier ("BST"). At that time, the PEG channels will no longer be cablecast in analog format. We intend, however, to "channel map" the PEG channels so that they will remain visible on their pre-existing channel numbers when accessed through a TWC-supplied set top box or a CableCARD equipped Unidirectional Digital Cable Product (UDCP).

Customers not subscribing to digital services will need digital equipment – for example, a digital television (or other device) equipped with a QAM tuner, a digital converter provided by TWC, or a CableCARD-equipped (UDCP) – to view the channels.

For those customers who do not already have digital equipment we will, upon request, offer one (1) standard digital box with remote control and access to the interactive program guide, Music Choice, and free On Demand programming in order that those customers may continue to have access to the PEG channels. BST- only customers will be provided such a converter, upon request, free of any monthly charge through December 31, 2015. Standard Service (BST plus the analog tier) customers who request a digital set top box in order to continue to have access to the PEG channels will not be charged a converter rental fee for the first year. Thereafter

normal rate card rates will apply to those converters. Standard Tier customers will have 60 days from the date of the offer to request a digital set top box. Finally digital customers who request additional converters in order to continue to access the PEG channels will be provided those converters under our normal rates. Perhaps most importantly, just as is the case today, no customer will be required to subscribe to a tier higher than the BST in order to continue to view the PEG channels

TWC will provide customers with at least 30 days advance notice using bill messaging, city channel messaging, and newspaper ads in order to make this change as seamless as possible. As noted above, TWC will "channel map" the PEG channels so that they will continue to be found on existing channel numbers when a TWC-supplied set box or a CableCARD-equipped (UDCP) is used. Customers using other devices to receive the digital channels, such as a cable-ready set with a QAM tuner, will find the PEG channels as follows:

	Channel Description	Analog Chann #	Digital Chann #	QAM #
	Gov	12	12	135.12
	Ed	17	17	135.17

As always, I am available to discuss this matter at any time. You can reach me by emailing thomas.aguillon@twcable.com or by calling 210-582-9525.

Sincerely,



Thomas Aguillon, Director of Government Relations

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Emergency Petition for Temporary Standstill, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

September 20, 2010

Date

A handwritten signature in dark ink, appearing to read "Joe Van Eaton", is written over a horizontal line.

Joseph Van Eaton

Miller & Van Eaton, P.L.L.C.

1155 Connecticut Avenue, N.W., Suite 1000


Washington, DC 20036-4306

(202) 785-0600

Certificate of Service

I hereby certify that I have caused to be mailed this 20th day of September 2010, copies of the foregoing Emergency Petition for Temporary Standstill, by first-class mail, postage prepaid, to the following persons:

Gardner Gillespie
Hogan Lovells
555 13th Street, N.W.
Washington, DC 20004-1109



Matthew K. Schettenhelm

Washington, D.C.

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